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No. 87-505

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CHICK KAM CHOO, et al.,
Petitioners,

v.

EXXON CORPORATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF CROWLEY MARITIME CORPORATION IN SUPPORT OF THE RESPONDENTS EXXON CORPORATION, ET AL.

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BRIEF AMICUS CURIAE OF CROWLEY MARITIME CORPORATION IN SUPPORT OF THE RESPONDENTS EXXON CORPORATION, ET AL.

Crowley Maritime Corporation ("Crowley") respectfully submits this brief *amicus curiae* in support of the position of the respondents Exxon Corporation, et al. pursuant to the written consent of the parties to the case, which consents are filed simultaneously herewith.

INTEREST OF THE AMICUS CURIAE

The interest of Crowley in this case arises from the fact that Crowley is the principal defendant in the several Ninth Circuit cases collectively known as *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *petition for cert. filed sub nom Crowley Maritime Corporation v. Zipfel*, No. 87-1122 (Jan. 4, 1988) ("*Zipfel*").

The *Zipfel* case presents the same issue that is before the Court in the present case. Namely, whether or not a federal admiralty

trial court has discretion to issue an injunction prohibiting a plaintiff from relitigating, in the state courts, a lawsuit which has previously been dismissed by that federal court on grounds of *forum non conveniens*. The present *Chick Kam Choo* case will, in all likelihood, be dispositive of the injunction issue in the *Zipfel* case.

In *Zipfel*, plaintiffs brought actions in the United States District Court for the Northern District of California for wrongful death and personal injury under the Jones Act (46 U.S.C. § 688) and under general maritime law. After filing their actions in the federal district court, certain of the *Zipfel* plaintiffs (represented by Petitioner Musslewhite who is also representing Chick Kam Choo herein) filed substantially identical complaints in the state courts of Texas. The state court actions remained dormant while the plaintiffs pursued their actions in the federal court. Motions to dismiss the actions on grounds of *forum non conveniens* were granted by the federal district court, which held that the plaintiffs' cases should properly have been heard in Singapore or Indonesia—not in the United States. The district court's order of dismissal contained certain conditional protections to allow the plaintiffs to refile their actions in Indonesia or Singapore. However, those plaintiffs did not file actions in Indonesia or Singapore. Instead, they activated their Texas state court lawsuits. The federal district court then enjoined the plaintiffs and their attorneys (including Petitioner Musslewhite) from prosecuting such actions. Upon appeal, the Ninth Circuit ruled that the district court had abused its discretion in enjoing the foreign plaintiffs from relitigating their claims in state court.

The Ninth Circuit's decision thus conflicts with the present decision of the Fifth Circuit in *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987). On November 16, 1987, the petition for writ of *certiorari* in the present case, based on that conflict, was granted.

Crowley is vitally interested in the outcome of *Chick Kam Choo* and has requested in its petition for writ of *certiorari* that the *Zipfel* case be consolidated with the present case so that Crowley will have the opportunity to present its views to the Supreme Court as a party. Additionally, Crowley is the principal

defendant in another Ninth Circuit case entitled *Villar, et al. v. Crowley Maritime Corporation, et al.* (9th Cir. No. 86-2381) ("*Villar*"), where precisely the same injunction issue is presented upon the same facts as are present in *Chick Kam Choo* and *Zipfel*. The *Villar* plaintiffs are also represented by Petitioner Musslewhite. On December 16, 1987, the Ninth Circuit issued its order that submission of the *Villar* case was vacated pending this Court's decision in *Chick Kam Choo*.

SUMMARY OF ARGUMENT

The federal district court in Houston did not abuse its discretion in issuing an injunction precluding the plaintiffs from relitigating exactly the same complaint in the Texas state court that the district court had dismissed. The injunction is allowed pursuant to the second and third exceptions in the Anti-Injunction Act (28 U.S.C. § 2283). Petitioners (and the Ninth Circuit) are in error in suggesting that a *forum non conveniens* dismissal is not "on the merits" so as to preclude injunctions against relitigation. A judgment on the merits has been rendered as to the matters which were actually adjudicated.

Petitioners' theory would allow a disappointed foreign litigant whose action has been dismissed under the doctrine of *forum non conveniens* in a federal admiralty court to infinitely relitigate the forum issue. Even if Exxon were successful in convincing the Texas state court to decline to hear the case, what happens next? By petitioners' logic, they could then refile their suits in the California state courts. Assume Exxon is again successful in California. Petitioners then go on to the next jurisdiction in pursuit of Exxon and so on through the 50 states in the hope that somewhere a single sympathetic judge will decide to keep the case.[1] It is hard to imagine a more bizarre procedure.

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[1] During all these proceedings the statutes of limitation would be tolled. *Burnett v. N.Y. Central Ry Co.*, 380 U.S. 424 (1965); *Reynolds v. Logan Charter Service, Inc.*, 565 F.Supp. 84 (N.D. Miss. 1983); *Marczak v. McAllister Bros., Inc.*, 439 F.Supp. 1075 (S.D.N.Y. 1977); *Izquierdo v. Cities Service Oil Co.*, 244 F.Supp. 758 (S.D.N.Y. 1965).

The basic issue that was before the district court in Houston was the appropriateness of the United States forum. That issue was litigated and decided. However, petitioners' position that the district court possesses no power to enjoin relitigation of this issue will lead to a complete waste of federal judicial resources. Instead of preventing or discouraging relitigation, petitioners actually invite relitigation with their view that a judgment of dismissal is not a "judgment" for the purposes of 28 U.S.C. § 2283.

Petitioners wish to refight their lost U.S. forum battle *ab initio*. They should not be allowed to restart the suit in another U.S. trial court but should remain in Singapore where they live and where the district court and the Fifth Circuit indicated the case should properly be heard. It is completely ill-advised to suggest that the parties repeat the tedious *forum non conveniens* process all over again in the state court even though the state might technically have jurisdiction. Petitioners chose the federal forum to pursue their claims. If they thought the state court presented a more appropriate forum, they should have filed their lawsuit there.

The essence of Petitioner Choo's and Petitioner Musslewhite's argument is that the vast federal litigation in these cases, including what the Fifth Circuit has referred to as "Choo I" (699 F.2d 693 (5th Cir.) *cert. denied sub nom. Chick Kam Choo v. Esso Oil Company*, 464 U.S. 826 (1983)), "Choo II" (764 F.2d 1148 (5th Cir. 1985)) and the present case "Choo III" (817 F.2d 307 (5th Cir. 1987)), not to mention the proceedings in the federal district court, was a meaningless exercise of federal judicial effort since the federal judgment has no preclusive effect.

The sole case which supports plaintiffs' position is the Ninth Circuit's *Zipfel* case which gives the injunction issue a very brief treatment with little analysis. In the Ninth Circuit's view, a *forum non conveniens* dismissal is a mere "procedural point" and is not "on the merits." 832 F.2d at 1488. However, in so ruling, the Ninth Circuit overlooked Federal Rule of Civil Procedure 41(b), which provides that such dismissal is "upon the merits."

In sum, allowing the plaintiffs to relitigate in the Texas state court on account of perceived "procedural" differences between the federal and state courts makes no more sense than allowing

relitigation based on perceived differences in jury selection procedures, service of process procedures, or evidentiary matters that arguably might work a different result for a plaintiff if he were given another chance.

ARGUMENT

A. The District Court Did Not Abuse Its Discretion In Issuing Its Injunction Prohibiting The Maintenance Of An Identical Lawsuit In The Texas State Court.

1. The District Court Had Power To Enjoin Plaintiffs' State Court Action Under The Relitigation Exception In The Anti-Injunction Act. The Ninth Circuit's Contrary View Leads To Chaotic Results.

The relitigation exception in the Anti-Injunction Act (28 U.S.C. § 2283) allows a United States district court to enjoin state court proceedings where the injunction will "protect or effectuate" the judgment of the district court:

> A federal court can enjoin state proceedings "to protect or effectuate its judgments." As a part of its function of protecting and effectuating its judgments, a federal court may enjoin the relitigation in state court of issues that the federal court has fully and finally adjudicated. This exception in § 2283 enables a federal court to prevent its judgment from being effectively nullified by a later contrary judgment which the Supreme Court may or may not decide to review. Thus, under circumstances warranting equitable interposition, a party with a favorable federal judgment need not rely on a plea of *res judicata* for the vindication of the rights derived from the judgment. Should the losing party in the federal action attempt to relitigate the matters adjudicated, the federal court may enjoin the action, even though brought in the state court.
>
> 1A Pt. 2 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 0.208a(3) (2d ed. 1985).

Petitioners' state court action will subject defendants to a burdensome and repetitious relitigation of the same issues which

the district court decided long ago. Defendants should not have to rely on a plea of *res judicata* in the state court for vindication of their rights as determined by the federal court's judgment on the merits of the dismissal. However, in the Ninth Circuit's view as expressed in *Zipfel*, the relitigation exception would not support the district court's injunction in the present case because there was no decision "on the merits." But the Ninth Circuit's view overlooks the fact that the decision was "on the merits" as to the issue that was litigated, i.e. the inappropriateness and inconvenience of the U.S. forum.

As noted in the Argument Summary, the sole case that supports plaintiffs' position is the *Zipfel* case. Yet, *Zipfel* does so in a most cursory manner. By contrast, the Fifth Circuit's opinion in *Chick Kam Choo* regarding the *res judicata* effect of *forum non conveniens* dismissal is well supported by the precedents in the Second, Third and Seventh Circuits. At 817 F.2d at 312, the Fifth Circuit emphasizes with approval Professor Wright's statement regarding *forum non conveniens* that "[I]ssue preclusion is appropriate if the issue actually remains the same." The Fifth Circuit recognizes that "[T]he species of *res judicata* with which we deal today is known as direct estoppel." The Seventh Circuit is in accord. *See Samuel C. Ennis & Co., Inc. v. Woodmar Realty Co.*, 542 F.2d 45, 49 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977): "The relitigation exception of § 2283 applies not only where the prior federal judgment is *res judicata* but also when the doctrine of collateral estoppel, or issue preclusion, is relied upon."

The Second Circuit stated in *Zoriano Sanchez v. Caribbean Carriers Ltd.*, 552 F.2d 70, 72 (2d Cir.), *cert. denied*, 434 U.S. 853 (1977):

> It is clear from the facts in the present case that plaintiffs-appellants pressed the same claim, involving the same parties and arising out of the same circumstances, before the district court in New York as they did before the district court in Puerto Rico. The issue of subject matter jurisdiction as to the Jones Act claims was "actually litigated and determined by a valid and final judgment", and that determination having been essential to that judgment, appellants are precluded from raising the issue once again in the Southern District of New York.

The Third Circuit agrees that a *forum non conveniens* decision has preclusive effect:

> In this case the appellants point to identical objective criteria and rely on identical material facts underlying the application of those criteria. Their contention amounts to no more than a wish that, in applying the objective criteria to the undisputed facts, a different judge would make the discretionary *forum non conveniens* determination. If appellants expected the district judge in Delaware to exercise a more discreet discretion than his judicial brother in the Southern District of New York, then they should have begun their litigation in Delaware. Having now finally lost in New York, they cannot relitigate the same factual and legal issues in Delaware.
>
> *Pastewka v. Texaco, Inc.*, 565 F.2d 851, 854 (3d Cir. 1977).

The Ninth Circuit's view conflicts with Federal Rule of Civil Procedure 41(b) which provides that such a dismissal is "upon the merits." *See Nasser v. Isthmian Lines*, 331 F.2d 124 (2d Cir. 1964), which holds that a so-called "procedural" dismissal is "on the merits" pursuant to Federal Rule of Civil Procedure 41(b).

The Seventh Circuit considered Federal Rule of Civil Procedure 41(b) in *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 943 (7th Cir. 1981):

> A more modern view includes not only those judgments based on legal rights, but extends to dismissals on other than traditionally substantive grounds. See Fed.R.Civ.P. 41(b); Reporter's Note, Restatement (Second) of Judgments § 48, at 42-43. Indeed, the Restatement (Second) of Judgments dispenses with the "on the merits" terminology "because of its possibly misleading connotations" Restatement (Second) of Judgments, § 48 at 36 (Tent. Draft No. 1 1973).

The Ninth Circuit in *Zipfel* overlooks its own previous decision in *Villar v. Crowley Maritime Corporation*, 782 F.2d 1478 (9th

Cir. 1986) (the first *Villar* case), where the district court was expressly authorized and directed to make pre-trial findings of disputed factual issues and reach the merits of the *forum non conveniens* and choice of law issues. Thus, the district court's order exercising its discretion to dismiss the *Chick Kam Choo* case was subject to *res judicata* principles for purposes of the Anti-Injunction Act. That act refers to a federal "judgment." The present cases involve a final federal judgment of dismissal.

In *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932), Justice Brandeis stated: "the principles of *res judicata* apply to questions of jurisdiction as well as to other issues." *See also Koziol v. The FYLGIA*, 230 F.2d 651 (2d Cir.), *cert. denied*, 352 U.S. 827 (1956), which involved a seaman whose federal court Jones Act action was dismissed for *forum non conveniens*. The appellate court held that the dismissal went to the merits and precluded relitigation under the doctrine of *res judicata*.

In both the *Chick Kam Choo* and the *Zipfel* cases (as well as in the pending *Villar* case), the state court actions which plaintiffs filed are substantially similar if not identical to the earlier federal actions. They are identical Jones Act actions brought on behalf of the same plaintiffs against the same defendants and arising out of the same incident involving the same decedents and the same vessels. If the state court actions are allowed to proceed, state court rulings inconsistent with the federal district court judgment could be issued, rendering the district court's decision a nullity.

Many of the arguments made by plaintiffs were also made to the district judge in *In Re Ocean Ranger Sinking Off Newfoundland*, 617 F.Supp. 435 (E.D. La. 1985). Those plaintiffs too were represented by Petitioner Musslewhite. In *Ocean Ranger*, Judge Collins dismissed the actions of the foreign plaintiffs on the grounds of *forum non conveniens*. Thereafter, they filed actions in Matagorda County, Texas. Judge Collins promptly enjoined the state court actions stating:

> The Court finds that this was a flagrant attempt to avoid the effect of the adverse judgment plaintiffs received by this Multidistrict Litigation Court. This action, filed by the same plaintiffs and the same attorneys who actually litigated

> before this Court, is based on the same cause of action presented in the federal forum. The Court finds that this is an effort to relitigate issues already determined by this Court. The Court will not tolerate abuse at [sic] the judicial system through duplicative and harassing litigation. An injunction is the appropriate sanction to preclude this "judicial hopscotch."
>
> 617 F.Supp. at 436.

Perhaps the most disquieting aspect of all is the *Chick Kam Choo* petitioners' (and the *Zipfel* respondents') candid admissions that the Texas state court might well decline, for its own reasons, to give *res judicata* or issue preclusive effect to the previous works of the federal courts and decide under its own doctrine of *forum non conveniens* to keep the cases. After all the time, trouble and effort that the parties and the federal courts have gone through to litigate the issue of the inappropriateness of a U.S. forum, it would be manifestly unjust that a state court judge might decide to keep the cases and proceed to trial. Had defendants lost the *forum non conveniens* argument in federal court, surely they would have had no recourse to the state court to have the matter considered anew. The unfairness of petitioners' position is that, when a nationwide corporation is sued, the plaintiffs may go from forum to forum, losing all the way, until they win a *forum non conveniens* motion. Defendant corporation, on the other hand, must win every single time in all the available U.S. courtrooms until finally the case is dismissed from the United States to plaintiffs' home country.

The *Chick Kam Choo*, *Zipfel* and *Villar* cases have given rise to immense and substantial federal litigation. The incidents which gave rise to the causes of action occurred many years ago. The complaints were filed in federal court years ago. The issues have been brought to or before the courts of appeal on several occasions. The parties and the courts have expended thousands of hours and hundreds of thousands of dollars. Hundreds, if not thousands, of pleadings and other papers are on the district court dockets from San Francisco to Houston. Many lengthy hearings have occurred before the district courts. There have been many oral arguments before the Ninth Circuit and the Fifth Circuit.

Multiple written opinions have been issued and published. There was final adjudication of each of these three cases through the federal system, which judicial system was chosen in the first instance in each case by plaintiffs.

Yet, petitioners here would argue that all of this was for naught and Exxon and Crowley must now be prepared to start over today in Texas and California. Presumably they should be prepared to start over in the future in Oregon, Louisiana or New York. If petitioners' theory is correct, by what principle can they be stopped from applying to an infinite number of courts? If petitioners are correct, the result is to make a mockery of federal *forum non conveniens* and to invite endless relitigation. What does such a strange scenario do but destroy the federal judgment, not "protect or effectuate" it as contemplated by 28 U.S.C. § 2283? This is antithetical to maritime principles of national uniformity established long ago and repeatedly upheld by this Court.

Perhaps the Court may ask what business is it of a federal court to tell a state court which cases it should or should not hear. Doesn't a respectful regard for the workings and capability of the state court system indicate that the district court should avoid conflict with the state court?

One answer to those questions is that Congress did not contemplate that, in each and every case, the federal court must defer to the discretion of the state court to apply relitigation principles and dismiss cases. Otherwise, the express exceptions contained in the Anti-Injunction Act would have been unnecessary. However, perhaps the best answer is that of Justice Reed who dissented in *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941), wherein the Supreme Court held that a federal court was without power to enjoin state court relitigation of cases and controversies fully adjudicated by the federal courts. The Reviser's Notes to 28 U.S.C. § 2283 indicate that it was amended explicitly to overrule *Toucey; accord, Mitchum v. Foster*, 407 U.S. 225, 236 (1972). Thus, Justice Reed has been vindicated. He dissented in *Toucey* with the following words:

> [The] alternative [to allowing injunctions against relitigation] is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication. We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field.

314 U.S. at 144 (footnotes omitted).

Such words fit precisely the situation that confronted the federal district courts in *Choo, Zipfel, Villar* and *Ocean Ranger, supra.*

Another court considered the issue and put forth its thoughts as follows:

> In a case such as this it would be a disservice not only to the defendants, but also to the state judiciary, to allow the entire record to be placed in the lap of the New York State courts to be argued over by lawyers and puzzled over by judges for years to come. While comity requires respect for the ability of the state courts to decide the issue of *res judicata* properly, it also requires sympathy for their calendar problems and for the task that would confront them were this relitigation to be imposed upon them.
>
> *Browning Debenture Holders' Com. v. DASA Corp.*, 454 F.Supp. 88, 105 (S.D.N.Y.), *aff'd.* 605 F.2d 35 (2d Cir. 1978).

2. In Addition To The Relitigation Exception, The Aid Of Jurisdiction Exception In Section 2283 Applies.

The second exception in Section 2283 allows the court to enjoin state proceedings where necessary in aid of the federal court's jurisdiction. As noted by Professor Moore:

But the second exception in § 2283 embraces more than *in rem* cases . . . It is . . . meant to give sufficient flexibility that a federal court, as a court of equity, may, when it has jurisdiction, deal adequately with the situation at hand.

. . .

Under the Code of 1948 the doctrine of *forum non conveniens* is recognized and the federal district court is given the power to transfer an action to a proper, but more convenient forum. As a consequence of that power and because of the second exception in § 2283 a federal district court should be able to enjoin any proceedings that interfere with its decision as to whether the chosen federal forum is a proper one.

> 1A Pt. 2 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 0.208a(2) (2d ed. 1985).

In other words, it is well settled that a federal district court retains jurisdiction to enforce its judgments. *See Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984): "A district court retains jurisdiction to enforce the judgment it enters." *See also In Re Ocean Ranger, supra*, 617 F.Supp. at 437; *Dugas v. American Surety Co. New York*, 300 U.S. 414 (1937). The court in *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977), held that an action for injunction to enforce a federal judgment is supplemental or ancillary, and therefore the jurisdiction follows that of the original suit. [2]

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[2] Petitioners' reliance in footnote 9 of their brief (page 14) on *Vendo Co. v. Lektro- Vend Corp.*, 433 U.S. 623, *reh'g denied*, 434 U.S. 881 (1977), is misplaced because *Vendo* dealt with *parallel in personam* actions. The Court acknowledged that when judgment is rendered in the first action, the principles of *res judicata* will apply to the other still pending action. *Id.* at 641-42. In the present case of course, the Court is not faced with "parallel" federal and state actions. Rather, the federal action has proceeded to conclusion and thus has *res judicata* effect as to the issues actually decided.

B. The Arguments Raised By Petitioners Are Not Persuasive And, Except For The *Zipfel* Case, There Is No Legal Authority Supporting The Petitioners' Position.

Notwithstanding the many cases cited by petitioners, only one is factually identical to the case that is before this Court. That is the Ninth Circuit's conflicting decision in *Zipfel*.[3] Both cases present the scenario of foreign seamen bringing an action, in the first instance, in a United States district court under the Jones Act and general maritime law. Subsequently, after the district court has held that U.S. law does not apply and has dismissed the case on grounds of *forum non conveniens*, plaintiffs attempt to relitigate the identical cases all over again in state court in Texas.

Therefore, notwithstanding petitioners' arguments about federalism, comity and preemption, the facts are that, what Petitioner Musslewhite has done is create an unprecedented situation in which a federal injunction is not nearly so "intrusive" as petitioners would portray it. Rather, *Choo, Zipfel, Villar* and *Ocean Ranger, supra*, involve a federal court issuing an injunction to prevent relitigation between the same parties of a controversy and an issue that was fully and completely litigated before it and decided by it pursuant to a final federal judgment. The presence of the prior federal judgment is the crucial distinction between *Choo* (and *Zipfel, Villar* and *Ocean Ranger*), and the cases cited by petitioners.

Petitioners' theoretical discussions regarding possible differences between federal *forum non conveniens* and state law *forum non conveniens* are beside the point. Petitioners' argument is akin to arguing that they should be allowed to relitigate their cases because they do not like the federal rules of evidence and now would prefer to relitigate under the Texas state rules of evidence. To state the argument is to demonstrate its absurdity.

At sub-part IA (beginning at page 15 of petitioners' brief), petitioners argue that they should be allowed to relitigate their action in Texas state court because (according to the sub-heading

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[3] The district court decisions in *Villar* and *Ocean Ranger, supra*, of course, are factually identical but are contrary to petitioners' position.

on page 15) the federal district court "never even considered, let alone decided, whether the Texas courts would have or could have entertained this case." Therefore, according to petitioners, the federal judgment has no preclusive effect. This is a very strange argument. It would require the prudent defendant wishing to bring a *forum non conveniens* motion to dismiss not only to raise, brief and argue the *forum non conveniens* law of the forum in which he may find himself sued, but also to raise, brief and argue the *forum non conveniens* law of every other jurisdiction in the United States (state and federal) in which he might conceivably be sued. This cannot be the law. Once again, plaintiffs chose the federal forum in the first instance. There should be some consequence attached to that choice.

Plaintiffs place great reliance on *Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970). However, that case is inapposite. There was no federal judgment to protect in *Atlantic Coastline*. *See* 398 U.S. at 293. In *Atlantic Coastline*, the Supreme Court rejected the district court's endeavor to function as a state appellate court, 398 U.S. at 293, 296. Neither Exxon here (nor Crowley in the *Zipfel* or *Villar* cases), asked the district court to assume the role of a state appellate court. What Exxon did was ask the district court to protect its duly considered judgment.

At page 20 of their brief, petitioners cite *State of Missouri Ex. Rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950) for the proposition that "state courts generally are free to decide *forum non conveniens* issues in accordance with their own standards, which may differ from those applied in federal courts." Nothing is wrong with that. But *State of Missouri Ex. Rel. Southern Ry. Co. v. Mayfield* did not involve a previous dismissal of the exact same case on grounds of *forum non conveniens*. The question is not whether or not Texas should be allowed to have any *forum non conveniens* doctrine. The issue is whether or not plaintiffs should be allowed to relitigate a federal *forum non conveniens* contest which they lost.

At page 24 of their brief, petitioners argue that the relitigation exception in Section 2283 applies only to "final resolution of the substantive merits of the case or controversy at issue." Presumably what petitioners mean is that, had Mrs. Choo litigated her case in the federal district court and had Exxon obtained a defense jury verdict after a complete trial, petitioners would not have had the audacity to start the whole process over again in state court. However, nothing in Section 2283 suggests that its exceptions are limited only to judgments entered after jury verdicts or after there has been a completed trial. Petitioners argue (on page 24) that the controversy in federal court should proceed to a point of "conclusive determination." This begs the question. The question is: conclusive determination of what? In the present cases, there was a conclusive determination that the United States was not the appropriate forum. It resulted in a final "judgment." Section 2283 by its terms applies to "judgments."

Would petitioners argue that a judgment of dismissal is not subject to Section 2283? What if a plaintiff's case was dismissed by the federal court and judgment entered on the grounds that the claim was time-barred by the applicable statute of limitations? Is the federal court without power to enjoin plaintiff from continually relitigating the time-barred claim?

Nothing in Section 2283, its legislative history or cases in aid of its interpretation indicates that a judgment of dismissal is entitled to any less respect or dignity than any other sort of federal judgment. *See*, for example, *Browning Debenture Holders' Com. v. DASA Corp.*, 454 F.Supp. 88, 105 (S.D.N.Y.), *aff'd.* 605 F.2d 35 (2d Cir. 1978) wherein plaintiff made certain claims against a bank in federal court which claims were dismissed before trial. Plaintiff then pursued the same claims in the state courts. The federal court was sustained in its issuance of an injunction against the state court relitigation.

Similarly, the court in *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939 (7th Cir. 1981) dismissed plaintiff's action in federal court on jurisdictional grounds and on the grounds that it failed to state a claim upon which relief could be granted. Dismissal was pursuant to a pretrial motion. The court issued a permanent injunction to prevent state relitigation of that action as well as litigation of a pending state court contract claim based upon the same physical act which gave rise to the federal cause of action. The Seventh Circuit affirmed and held that the

motion went to the merits for *res judicata* purposes even as to the pendent state court contract claim.

Furthermore, a strict application of *res judicata* is not necessary for the third exception in § 2283 to apply:

> The "effectuate its judgments" exemption (from the provisions of the anti-injunction statute) was added in 1948 to permit a federal court to enjoin relitigation in a state court of a matter determined by a judgment of the federal court . . . *Samuel C. Ennis & Co. v. Woodmar Realty Co.*, 542 F.2d 45, 49 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096, 97 S.Ct. 1112, 51 L.Ed.2d 543 (1977). The relitigation exception . . . applies not only when the prior federal judgment is *res judicata* but also when the doctrine of collateral estoppel, or issue preclusion is relied upon. *Ibid.* And this exception from the statute applies to interlocutory orders as well as final decrees. *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245, 249 (2d Cir. 1961).
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> *Complaint of Cosmopolitan Shipping Co., S.A.*, 453 F.Supp. 268, 270 (S.D.N.Y. 1978).

Crowley agrees with petitioners (at page 25 of their brief) that the dissenting views expressed by Mr. Justice Reed in the *Toucey* case, *supra*, should be accorded deference. However, nowhere does Justice Reed indicate that he is limiting his comments to cases where there has been a final jury verdict. In fact, *Choo, Zipfel* and *Villar* did produce the "thousands of pages of evidence" referred to by Justice Reed.

At page 27 (Part IC) of their brief, petitioners argue that the issuance of the federal court injunction prevents "state courts from deciding for themselves whether matters are preempted by federal law" and cite *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511 (1955). This argument misses the mark for two reasons. First, no one is urging that some new judicially made exception to Section 2283 be invented, i.e. the so-called "preemption exception." Crowley would be quite content to rely upon the stated exceptions contained in Section 2283. Second, petitioners' reliance on *Amalgamated Clothing* is misplaced for the same reason that their reliance on *Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Engineers, supra*, is misplaced. Specifically, in *Amalgamated* there was no prior federal judgment to protect.

Amalgamated involved an employer who filed a suit in state court to enjoin a union from picketing the employer's stores. The state court then denied the union's motion to dismiss the action on the ground that the NLRB had exclusive jurisdiction over the subject matter. The union then sought an injunction from the federal district court requiring the employer to dismiss the state court suit. As in *Atlantic Coastline*, the Supreme Court properly recognized that a district court's function is not to operate as a state appellate court and, since there was no prior federal judgment to protect, the injunction could not properly issue.[4]

In Part IIA of their brief on page 30, petitioners argue about a state's interest in determining its own *forum non conveniens* doctrine. Again, this misses the point. The facts of the present cases are that there has been a prior federal dismissal on grounds of *forum non conveniens* and a relitigation of exactly the same cases in the state system. The present cases are not ones in which a federal court has decided under some misguided notion of "preemption" to begin interfering in the orderly process of state judicial affairs. The federal court is merely trying to protect and effectuate its judgment and the defendants that were before it in

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[4] In footnote 21, petitioners cite *Prack v. Weissinger*, 276 F.2d 446 (4th Cir. 1960). But *Prack* was not an injunction case and therefore is inapposite. The Fourth Circuit in *Prack* held that, since the federal district court had no jurisdiction over the state court claim, it was without power to determine the jurisdiction of the state court. By contrast, here the federal court had jurisdiction over petitioners' claims. *Prack* does not address the issues that are before this Court, i.e. the power of a district court under Section 2283 to protect its judgments and preclude relitigation.

Domingo v. States Marine Lines, 340 F.Supp. 811 (S.D.N.Y. 1972), which is also cited by petitioners in note 21, was not an injunction case either and merely recognized that principles of *res judicata* may not apply to *forum non conveniens* decisions if the underlying actions are truly different. In the present case the underlying state and federal actions are identical.

the same case from having to go through the same exercise all over again in the state court.[5]

The basic thrust of the trial court judgments in *Chick Kam Choo, Zipfel* and *Villar* was that these federal district courts decided that the United States was an inappropriate forum and that the Far East was the preferable forum. Crowley acknowledges if, following these federal decisions, the plaintiffs had refiled their actions not in the Far East but in South America or Saudi Arabia or some other foreign jurisdiction which had legitimate contacts with the cause of action, the previous decision of the United States federal district court regarding the inappropriateness of the U.S. forum would have little if any, preclusive effect on whether or not the actions should properly be heard in South America or Saudi Arabia. However, that is a far cry from what has happened in *Choo, Zipfel* and *Villar*. Those plaintiffs have refiled again in the United States. In the *Zipfel* case, they were dismissed from the federal district court in San Francisco and refiled in state court in Texas. In both *Choo* and *Villar*, the cases were dismissed in federal district courts and then refiled in state courts in the very same cities in the United States in which the dismissing federal courts were located.

Crowley strenuously urges that prevention of such relitigation and protection of federal judgments does not unduly intrude on state affairs and is expressly permitted by 28 U.S.C. § 2283. It is petitioners' forum shopping and refusal to accept defeat that is

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[5] At page 31, note 22 of their brief, petitioners refer to *Parsons v. Chesapeake & O. Ry. Co.*, 375 U.S. 71 (1963) (*per curiam*), for the proposition that principles of *res judicata* are not applicable to *forum non conveniens* decisions. *Parsons* was not an injunction case. The situation in *Parsons* was one where the defendant was endeavoring to use a prior state court *forum non conveniens* decision to prevent a federal district judge from exercising his powers under 28 U.S.C. § 1404(a) regarding transfer of actions between federal districts. *Forum non conveniens* dismissals and § 1404(a) transfers are entirely different exercises. *Piper Aircraft Company v. Reyno*, 454 U.S. 235, 253 (1981), *reh'g denied*, 455 U.S. 928 (1982); *Veba-Chemie A.G. v. M/V GETAFIX*, 711 F.2d 1243, 1246 (5th Cir. 1983), *reh'g denied*, 724 F.2d 976 (5th Cir. 1984).

both an intrusion and an abuse of the state judicial system as well as a mockery of the federal judicial system.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the judgment of the Fifth Circuit below be affirmed.

Respectfully submitted,

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